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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 UNITED STATES OF AMERICA,

4 v.

22-cr-273 (JSR)

5 VITALY BORKER,

6
7 Defendant.

8 Conference

9
10 New York, N.Y.
August 16, 2022
11 3:00 p.m.

12 Before:

13 HON. JED S. RAKOFF,

14 District Judge

15 APPEARANCES

16 DAMIAN WILLIAMS

17 United States Attorney for the
Southern District of New York

18 BY: MATTHEW WEINBERG

Assistant United States Attorney

19 LEO SHALIT

20 Attorney for Defendant

21 ALSO PRESENT:

22 U.S. Postal Inspector Daniel Gabel

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(Case called)

MR. WEINBERG: Good afternoon, your Honor.

Matthew Weinberg, appearing for the government.

With me at counsel table is Postal Inspector Daniel Gabel from the United States Postal Inspection Service.

THE COURT: Good afternoon.

MR. SHALIT: Good afternoon, your Honor.

For the defendant, Leo Shalit.

THE DEFENDANT: Vitaly Borker.

THE COURT: Good afternoon.

All right. We have several pieces of business to take up.

The first are the motions made by the defense. The first motion is a motion to dismiss Count Three, the aggravated identity theft, on the ground that the indictment fails to state all the elements of the offense.

That motion is denied.

The indictment is sufficient, given Second Circuit precedent that it is sufficient even if it does "little more than track the language of the statute and state the time and place and approximate terms of the alleged crime." That's a quote from United States v. Wedd, 993 F.3d 104 (2d Cir. 2021).

Nevertheless, I think some particulars may have to be furnished in respect to Count Three, but I will get to that shortly.

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1 The second motion is a motion to dismiss Counts One
2 and Two on the grounds that they infringe the double jeopardy
3 clause because of Mr. Borker's previous guilty plea to similar
4 crimes. But the criminal conduct here, though similar in kind,
5 took place during a time period for which he has never been
6 prosecuted. So that motion is denied.

7 The third motion is a request for a bench trial.

8 What's the government's position?

9 MR. WEINBERG: Your Honor, for the government to
10 consent to a bench trial requires approvals far above my level
11 in the U.S. Attorney's Office. I do not yet have an answer on
12 the government's position.

13 THE COURT: Wait a minute.

14 When did you receive these motions?

15 MR. WEINBERG: August 3, your Honor.

16 THE COURT: It is now August 16. You knew I would
17 want to know the government's position, not least because we
18 are going to set a trial date.

19 Who is it you needed to run it by?

20 MR. WEINBERG: It actually goes up to the U.S.
21 Attorney himself.

22 THE COURT: To the U.S. attorney?

23 MR. WEINBERG: Yes, your Honor.

24 THE COURT: Let's see if we can get him on the phone.

25 What's his number?

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1 MR. WEINBERG: You are asking me?

2 THE COURT: I am asking you.

3 MR. WEINBERG: I do not know his number. I can look
4 in my phone, which I'm happy to do.

5 THE COURT: Hold on. We'll find it.

6 What did you do to try to get an answer from the U.S.
7 Attorney?

8 MR. WEINBERG: Your Honor, I discussed it with my
9 supervisors and I was intending to discuss it with defense
10 counsel further today. I apologize. I should have taken more
11 steps.

12 THE COURT: Do you know whether anyone actually
13 reached out to the U.S. Attorney?

14 MR. WEINBERG: I do not believe anyone has reached out
15 to the U.S. Attorney on this. I can do that.

16 THE COURT: So you discussed it with your supervisors.
17 Who specifically did you discuss it with?

18 MR. WEINBERG: The former chief of the General Crimes
19 Unit, who just left the office two weeks ago, Rebecca
20 Mermelstein, and my current chief, Jordan Estes.

21 THE COURT: Your current chief?

22 MR. WEINBERG: Jordan Estes.

23 THE COURT: What is Ms. Estes number?

24 THE DEPUTY CLERK: Ms. Estes number is 212-637-2543.

25 THE COURT: This is Judge Rakoff. Ms. Estes, I am

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1 calling you in open court in connection with a case called
2 United States v. Borker, 22 Cr. 273, a mail fraud case. The
3 defense made a motion for a bench trial which was filed on
4 August 3.

5 Today is the final pretrial conference, when I'm
6 planning, among other things, to set the firm, fixed, final
7 trial date, which of course could be affected because it could
8 affect the length of the trial as to whether it's a bench trial
9 or a jury trial. So I asked the AUSA what the government's
10 position was, and his initial response was that it had to be
11 run by the U.S. Attorney, Mr. Williams. So I then inquired as
12 to what efforts had been made to bring it to Mr. Williams'
13 attention, and the AUSA indicated that perhaps it never had
14 been brought to Mr. Williams' attention, that he had discussed
15 it with your predecessor, and then I gather briefly with you,
16 and that is, as far as he knew, as to where things stood.

17 So before I decide where we go from here, I wonder if
18 you had any information to share on this.

19 (Pause)

20 THE COURT: Okay. Well, if you can get us an answer
21 today, that will be appreciated.

22 I am aware of the standing policy in that regard, and
23 I don't take personally the fact that you and the office
24 clearly has no faith in the judges of this Court. So, anyway,
25 if you could convey your answer to my chambers by the end of

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1 the day that would be much appreciated.

2 Thank you.

3 So Ms. Estes said that she first heard about this
4 earlier today and that she felt she could get us an answer from
5 Mr. Williams by the end of the day. However, she wanted to
6 mention to the Court the longstanding position of the U.S.
7 Attorney's Office to possess such requests.

8 I know from personal experience that that is the
9 longstanding position of the U.S. Attorney's Office. When I
10 first went on the bench 26 years ago, the defense made a
11 similar request in the very first trial I had that began one
12 week after I went on the bench. And the government said it was
13 its longstanding policy then to oppose such requests. So this
14 apparently goes back -- who knows? A hundred years? 150
15 years? It is as silly now as it was in the previous 150 years.
16 It's always good to know that, especially with the pandemic and
17 with the heavy dockets that the Court has and its attempt --
18 not just this Court, but all my fellow judges -- to catch up on
19 the pandemic-induced backlog that the U.S. Attorney's Office
20 feels that that is small potatoes compared to a position that
21 apparently goes back to at least the time of George Washington,
22 if not Attila the Hun. So I will proceed on the assumption
23 that this is going to be a jury trial.

24 I am, of course, personally delighted, because I
25 always love jury trials. Why should I have to decide anything

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1 as important as whether someone is guilty or not when 12 good
2 and true citizens can make that determination.

3 So I will assume it's going to be a jury trial. If I
4 hear otherwise before the end of the day from Ms. Estes I will,
5 of course, reach out to counsel to notify them.

6 All right. Let's continue with the motions, though
7 none are quite as good fun as that one.

8 Next is the request for a bill of particulars.

9 Now, there are various aspects of this. Let's talk
10 about Count Three first.

11 So Count Three reads as follows:

12 "The grand jury charges:

13 "From at least in or about June 2020, up to and
14 including at least in or about February 2022, in the Southern
15 District of New York and elsewhere, Vitaly Borker, the
16 defendant, knowingly did transfer, possess, and use without
17 lawful authority a means of identification of another person
18 during and in relation to a felony violation enumerated in
19 Title 18, United States Code, Section 1028A(c). To wit, Borker
20 used and transferred the names of two other persons (Individual
21 1 and Individual 2) during and in relation to the mail and wire
22 fraud violations charged in Counts One and Two of this
23 indictment."

24 While that is, as I've already ruled, sufficient to
25 sustain the indictment against the motion to dismiss, I don't

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1 see how defense counsel can adequately prepare for trial
2 without knowing who is Individual 1 and Individual 2. So the
3 government will file a written bill of particulars identifying
4 those two individuals no later than a week from today.

5 The other aspect of the motion for a bill of
6 particulars relates to the mail and wire fraud counts, Counts
7 One and Two, which, after going through the statutory
8 allegations, add the following language. This is from the last
9 part of Count One: "To wit, Borker defrauded customers of his
10 retail eyewear website, eyeglassesdepot.com, by, among other
11 things, misrepresenting the authenticity and condition of
12 merchandise he sold and mailed to such customers."

13 So let me ask the government, what have you provided
14 by way of discovery, if any, relating to those alleged
15 misrepresentations?

16 MR. WEINBERG: Yes, your Honor.

17 So, first of all, as the Court is aware, there is a
18 fairly detailed complaint that was filed in this matter prior
19 to the indictment which, of course, has been --

20 THE COURT: Yes. The complaint is one of the reasons
21 that I don't think I should grant the bill of particulars as a
22 general matter as to Counts One and Two, because a great deal
23 of specificity, although it's not technically quite as binding
24 as a bill of particulars would be, but it more than adds a lot
25 of the detail. But nevertheless, is there any other discovery

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1 that's been provided with respect to this area that we are
2 talking about?

3 MR. WEINBERG: There's significant discovery which
4 shows the defendant selling, or the defendant's website selling
5 to customers glasses that are represented as new and authentic
6 and that those orders were filled with glasses that were either
7 used and/or inauthentic.

8 THE COURT: I guess what bothers me is the words
9 "among other things." So let me ask you this: Is the
10 government going to assert any other things? If not, I don't
11 have to order any bill of particulars on this aspect for the
12 reasons already mentioned. But if it is, I think there might
13 have to be a bill of particulars as to what are the "other
14 things."

15 MR. WEINBERG: The other things that are referred to
16 in the complaint and in the discovery is the repair side of the
17 business. There were representations made that the website
18 does repairs of eyeglasses as well, and there was evidence that
19 customers sent in eyeglasses for repair and that the repairs
20 were never completed or were completed in such a manner that --

21 THE COURT: Okay. Forgive me for cutting you off. I
22 don't agree with the defense that you have to supply the date
23 and all the specifics as to each misrepresentation. That's
24 classic trial evidence. But I do think you need to specify in
25 writing, either as part of your bill of particulars, or it can

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1 be a separate writing, but something that is binding on you as
2 to what the other things are. Otherwise the defense can't
3 prepare adequately as to that.

4 So that should be within two weeks either as part of
5 the bill of particulars, or it can be, if you prefer, in a
6 letter form or something. Again, it doesn't have to go through
7 minute evidentiary detail, but it has to be sufficient as in
8 the fashion you were just beginning to say orally, to give the
9 defense the idea of the general nature of what those "other
10 things" are.

11 All right. Now, with respect to the motion to
12 suppress the statements made by the defendant to the probation
13 officer verifying his place of residence on the alleged ground
14 that this is confidential, that the probation officer by
15 cooperating with the prosecution has become an agent of the
16 prosecution and thus the statements would have had to have been
17 made in the presence of Borker's counsel, that motion is
18 denied. *See, e.g., United States v. Jennings*, 2009 WL 4110852,
19 a decision by Judge McAvoy in the Northern District of New York
20 in 2009, upholding a probation officer's authority to assist
21 with a law enforcement investigation without thereby becoming
22 an agent of the prosecution.

23 And the final motion is a motion to suppress evidence
24 acquired from three search warrants.

25 I have carefully reviewed the search warrants. Not

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1 only do I think that they meet all the requirements of law on
2 their face, but even if that were not true, they would still
3 fall within the good faith exception. *See United States v.*
4 *Moore*, 968 F.2d 216 (2d Cir. 1992).

5 So the next thing we need to do is set a trial date.

6 How long a trial does the government contemplate?

7 MR. WEINBERG: Your Honor --

8 THE COURT: Remembering, of course, that it's going to
9 be a jury trial.

10 MR. WEINBERG: On the assumption that it is a jury
11 trial, we would expect it to be approximately one week.

12 THE COURT: Okay.

13 And defense counsel agrees with that?

14 MR. SHALIT: Yes, your Honor. I believe a week will
15 be sufficient.

16 THE COURT: Okay. Let me ask defense counsel, what
17 dates are you not available over the next couple of months?

18 MR. SHALIT: May I check my phone, your Honor?

19 I have my calendar on my phone.

20 THE COURT: I'm sorry. Yes. Take your calendar out.
21 Also, why don't you go to the rostrum, where you can take off
22 your mask, and then I can clear you more clearly.

23 MR. SHALIT: Sure. I just asked for permission to
24 check my phone. I have my calendar on my phone.

25 THE COURT: Yes.

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1 MR. SHALIT: So, to block out about a week, a week and
2 a half, I could do in the middle of December or early December,
3 your Honor.

4 THE COURT: What are you doing in October and
5 November?

6 MR. SHALIT: I am a solo practitioner. I have a heavy
7 litigation calendar. To block off, you know, an entire week at
8 a time is challenging, unless it's done in advance. I can see
9 November 14 through the 18th. I have that week available right
10 now.

11 THE COURT: I'm sorry. You're saying November 14 is
12 or is not available?

13 MR. SHALIT: It is. That week November 14 through the
14 18th.

15 THE COURT: Okay. So that sounds reasonable to the
16 Court.

17 So we will put the trial down -- I'm sorry. I have to
18 sit on the Ninth Circuit that week. I'm sorry.

19 MR. SHALIT: I am also available --

20 THE COURT: That is a court that doesn't itself handle
21 jury trials. I wonder how they survive.

22 Yes?

23 MR. SHALIT: I have the next week, the 21st to the
24 23rd, right before Thanksgiving, and then the following, 28th
25 through --

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1 THE COURT: Let's look at those weeks.

2 THE DEPUTY CLERK: You do not have a trial on the week
3 beginning the 21st, although it does end with Thanksgiving.

4 THE COURT: The likelihood is we would sit Monday,
5 Tuesday, Wednesday and then take a two-day break and then pick
6 up the following Monday.

7 THE DEPUTY CLERK: *In Re Platinum Beechwood* starts the
8 following Thursday.

9 THE COURT: I think we would be over by then. If not,
10 the other is a civil case. We would just have them start a
11 little later.

12 THE DEPUTY CLERK: Okay.

13 THE COURT: We'll put it down then. That was
14 November?

15 THE DEPUTY CLERK: 21st.

16 THE COURT: November 21st.

17 Take a look at my individual rules, which set forth
18 the deadlines for motions *in limine*, requests to charge, things
19 of that sort.

20 Pursuant to Section 3161 of Title 18 I will exclude
21 from calculations under the Speedy Trial Act all time between
22 now and November 21, finding that such time is necessary to
23 accommodate defense counsel's reasonable schedule and have him
24 adequately prepare for trial, not to mention the several hours
25 it will take to hear from the government on the jury trial

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1 issue, and that for those and other reasons the best interest
2 of justice in excluding such time substantially outweighs the
3 interests of the public and the defendant in a speedy trial.

4 Okay. Anything else we need to take up today?

5 MR. WEINBERG: Nothing from the government.

6 MR. SHALIT: No, your Honor. Thank you, your Honor.

7 THE COURT: Very good. Thanks very much.

8 (Adjourned)